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Nos. 88-1671 and 88-1688

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

COMMITTEE ON LEGAL ETHICS OF THE WEST VIRGINIA STATE BAR, PETITIONER

v.

GEORGE R. TRIPLETT, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF FOR THE FEDERAL PETITIONER

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QUESTION PRESENTED

Whether the attorney's fee provisions of the Black Lung Benefits Act, as applied, violate the Due Process Clause of the Fifth Amendment by denying claimants access to counsel.

PARTIES TO THE PROCEEDING

The petitioner in No. 88-1671 is the United States Department of Labor, intervenor below. The petitioner in No. 88-1688 is the Committee on Legal Ethics of the West Virginia State Bar, the petitioner below. George R. Triplett, the respondent below, is the respondent in this Court.

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BRIEF FOR THE FEDERAL PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Appeals (Pet. App. 1a-32a), was originally reported at 376 S.E.2d 818. It was subsequently withdrawn and reported as

corrected, with a dissenting opinion (Pet. App. 33a-36a) and an opinion on the denial of rehearing (Pet. App. 37a-41a), at 378 S.E.2d 82 The Findings of Fact, Conclusions of Law, and Recommendation Concerning Discipline of the Committee on Legal Ethics of the West Virginia State Bar (Pet. App. 42a-51a) is unreported.

JURISDICTION

The judgment of the Supreme Court of Appeals was entered October 26, 1988. A petition for rehearing was denied on December 21, 1988 (Pet. App. 52a). On March 14, 1989, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including April 20, 1989. The petitions for certiorari were filed on April 12, 1989 (No. 88-1671) and April 18, 1989 (No. 88-1688), and granted on October 2, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 422(a) of the Black Lung Benefits Act, 30 U.S.C. 932(a) (1982 & Supp. V 1987), incorporating various provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA), and Section 28 of the LHWCA, 33 U.S.C. 928 (1982 & Supp. V (1987), which is one of the provisions so incorporated, are set forth in the appendix to the Department of Labor's petition (88-1671 Pet. App. 53a-56a).

The Department of Labor's regulations governing the payment of claimants' attorney's fees in black lung cases, 20 C.F.R. 725.365-725.367, are also set forth in that appendix (Pet. App. 57a-60a).

STATEMENT

1. The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* (1982 & Supp. V 1987), "provides benefits to those who have become totally disabled because of pneumoconiosis, a chronic respiratory and pulmonary disease arising from coal mine employment," and to their eligible survivors. *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 417 (1988). Claims for benefits are determined administratively under the auspices of the Department of Labor. 30 U.S.C. 932 (1982 & Supp. V 1987); 20 C.F.R. 725.350.[1] A claimant may be represented "in any proceeding for determination of a claim" by a qualified representative, including an attorney. 20 C.F.R. 725.362, 725.363. As part of its protection for eligible beneficiaries, the Act, through its incorporation of provisions of the Longshore and Harbor Workers Compensation Act (LHWCA), regulates the payment of fees for a claimant's attorney. See 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating, *inter alia*, 33 U.S.C. 928 (1982 & Supp. V (1987)). The Department of Labor has also issued comprehensive regulations governing the award of attorney's fees. 20 C.F.R. 725.362-725.367.

Under the Act and the Department of Labor's regulations, an attorney for a black lung claimant is pro-

[1] Black lung claims filed between July 1 and December 31, 1973 (transitional claims), and claims filed after December 31, 1973 (Part C claims) are administered by the Department of Labor. See 30 U.S.C. 925, 931-932 (1982 & Supp. V 1987). A temporary program of federally funded benefits for claims filed before July 1, 1973 (Part B), was administered by the Secretary of Health, Education and Welfare. See 30 U.S.C. 921-924 (1982 & Supp. V 1987); 20 C.F.R. 725.1(b). See *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 138-139 (1987).

hibited from charging a fee unless the fee has been approved by the appropriate agency or court. 33 U.S.C. 928(c); 20 C.F.R. 725.365. The regulations also provide that "[n]o contract or prior agreement for a fee shall be valid." 20 C.F.R. 725.365, 725.362 (a). See also 20 C.F.R. 802.203(f) (Benefits Review Board regulation). When the claimant does not prevail in his effort to secure benefits, no fee is approved. See *General Dynamics Corp.* v. *Horrigan*, 848 F.2d 321 (1st Cir.) (applying LHWCA), cert. denied, 109 S. Ct. 554 (1988); *Director, OWCP* v. *Hemingway Transp. Inc.*, 1 Ben. Rev. Bd. Serv. (MB) 73 (Ben. Rev. Bd. 1974). When the claimant does prevail in a contested case, the coal mine operator, its insurance carrier, or, in certain instances, the Black Lung Disability Trust Fund pays "a reasonable attorney's fee."[2] 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating 33 U.S.C. 928(a)), 932(j); see 20 C.F.R. 725.367.

The black lung regulations establish the procedures for applying for a fee and the criteria for its award. See 20 C.F.R. 725.366. The application must itemize the work done and note "the customary billing rate" of the person who performed it. *Ibid.* An approved fee "shall be reasonably commensurate with the necessary work done." 20 C.F.R. 725.366(b). The regulation identifies as factors to be taken into account in setting a fee "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to

[2] The Black Lung Disability Trust Fund is a Treasury account financed by the coal-mining industry through an excise tax on coal. The Trust Fund is administered by the Director of the Office of Workers' Compensation Programs in the Department of Labor. See 30 U.S.C. 934; 26 U.S.C. 4121(a), 9501 (1982 & Supp. V 1987).

which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." *Ibid.* See also 20 C.F.R. 802.203(d) and (e) (Benefits Review Board provisions).

An award of attorney's fees is not enforceable until the claimant receives a final award of benefits. 33 U.S.C. 928(a). A claim for benefits is first submitted to a Department of Labor deputy commissioner for an initial determination. 20 C.F.R. 725.401-725.420. Any party dissatisfied with the deputy commissioner's determination can request a de novo hearing before an administrative law judge (ALJ). 20 C.F.R. 725.419(a), 725.421. The ALJ's decision is subject to review by the Benefits Review Board. Review of that decision, in turn, is available in a court of appeals. 30 U.S.C. 932(a) (1982 & Supp. V 1987) incorporating, *inter alia*, 33 U.S.C. 921(c); 20 C.F.R. 725.481, 725.482.

An attorney must apply for fees separately to the "deputy commissioner, administrative law judge, or appropriate appellate tribunal" before whom the services were performed. 20 C.F.R. 725.366(a). An approved fee "shall be paid promptly and directly by the operator or carrier to the claimant's attorney in a lump sum after the order becomes final." 20 C.F.R. 725.367(a). The fee award does not bear post-judgment interest pending an appeal. See *Hobbs* v. *Director, OWCP*, 820 F.2d 1528, 1530-1531 (9th Cir. 1987) (applying LHWCA). Nevertheless, the attorney's possible delay in being paid, as well as his risk of loss, are assumed to be reflected in his hourly rates. *Id.* at 1529 (delay); *Thompson* v. *Potashnick Constr. Co.*, 812 F.2d 574, 577 (9th Cir. 1987) (describing Board policy under LHWCA regarding delay and risk of loss).

2. Beginning in 1978, respondent, a West Virginia lawyer, entered into contingent fee agreements with sixteen black lung claimants. These agreements entitled him to 25% of the back benefits recovered by the claimants as a result of his representation.[3] Between 1978 and 1983, claimants represented by respondent were awarded benefits, and he collected fees under the contingent fee arrangments. These fees were never approved by the appropriate agency or court; as a result, the fees were collected in violation of both the statute and governing regulations. Pet. App. 2a, 46a-49a; see 33 U S.C. 928(c); 20 C.F.R. 725.365.

In 1987, the Committee on Legal Ethics of the West Virginia State Bar initiated a disciplinary proceeding against respondent based on his violations of the Department's fee regulations. Following a hearing, the Committee found respondent to have engaged in professional misconduct. Pet. App. 42a-44a. The misconduct consisted of "[h]is failure to abide by the [Department] regulation," a failure that constituted, among other things, "conduct that is prejudicial to the administration of justice" and that "adversely reflects on his fitness to practice law." *Id.* at 50a (citing West Virginia Code of Professional Responsibility DR 1-102(A)(4), (5), and (6) (1982)). The Committee filed a complaint in the Supreme Court of Appeals of West Virginia to enforce a recommended six-month suspension. Pet. App. 1a.

[3] A claimant, when found eligible for benefits, receives a lump sum representing past due benefits from the onset of disability to the date of the award. In addition, claimants receive future benefits, paid monthly, after they are determined to be eligible. 20 C.F.R. 725.502.

3. a. A divided Supreme Court of Appeals denied enforcement. Pet. App. 1a-32a. Although respondent had not challenged the black lung fee system on constitutional grounds, the court concluded, *sua sponte*, that the fee system violates the Due Process Clause. The court reasoned that the provisions for awarding attorney's fees under the black lung statute and the Department's regulations, as applied, "severely restrict [black lung] claimants' ability to find competent lawyers to represent them." *Id.* at 24a. Consequently, the court found, claimants are denied adequate procedural protection of their property interest in the continued receipt of black lung benefits. The court concluded that because the attorney's fee limitations were unconstitutional, respondent's failure to comply with the Department's regulations did not violate West Virginia ethical rules.[4] *Id.* at 30a.

The court acknowledged that the Department's regulations "appear[] to provide for attorneys' fees that will fairly compensate competent counsel," but it nevertheless stated that "the factual record before us reveals that this is not the case." Pet. App. 16a. That record consisted solely of the affidavits of five attorneys submitted to the court as attachments to an amicus brief, excerpts from testimony below, and statements by attorneys before a House of Representatives Subcommittee in 1985. *Id.* at 17a-20a (citing *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Standards*

[4] The court rejected the Committee's charge in its complaint that Triplett had misrepresented his fee arrangements to the Department, finding that the Committee had not adequately alleged such a violation and that the evidence did not support it in any event. Pet. App. 5a-6a.

of the House Comm. on Education and Labor, 99th Cong., 1st Sess. (1985)). See also Br. in Opp. App. A36-A45 (testimony at disciplinary hearing).

Based on that record, the court determined that the fee provisions manifested two inadequacies that deter "most" attorneys from taking on black lung cases. Those problems were "the long delay in payment, without any provision for interest, and the lack of premiums to offset the contingent nature of the work." The court added that the contingency factor had assumed greater importance as approval rates "steadily declined" under the tighter eligibility criteria of the 1981 amendments to the black lung statute. The court cited an approval rate of 22.7% for claimants whose cases went before an ALJ and a 5.8% overall rate under the 1981 amendments. The low approval rate, the court believed, established "not only the necessity of lawyer representation, but [also] the substantial risk that a lawyer will receive no fee at all for his work." Pet. App. 20a.

The court then evaluated the attorney's fee system under the three-factor test articulated by this Court in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985). Pet. App. 20a-24a. Applying that test, this Court in *Walters* upheld Congress's $10 fee limitation for attorneys in Veterans' Administration (VA) benefits proceedings in the face of a due process challenge. The court here applied the *Mathews* factors to reach the opposite result.

As to the first factor, the court identified two government interests in the regulation of fees in the black lung program: (1) the fee approval requirement serves "to ensure that neither the responsible operator nor the Trust Fund will be overcharged"; and (2) the prohibition of private fee agreements serves "to protect claimants from improvident agreements that needlessly deplete their benefits." Pet. App. 21a. The court discounted these interests, however, because of its view that the fee system in operation has made lawyers "almost entirely unavailable to claimants." The result, in the court's view, was that "under the current system the claimant seldom has an award to share." *Ibid.*

Turning to the second factor, the probability of error under the current system and the likely value of additional procedures, the court surmised that the absence of counsel poses a serious risk of an erroneous result. Although acknowledging that it lacked statistics comparing the success rates of black lung claimants with and without counsel, the court asserted that the "black lung claims process is procedurally, factually and legally complex," and that "lawyer representation is virtually essential to prevent erroneous deprivations of benefits for victims of black lung." Pet. App. 22a-23a.

Finally, the court evaluated the weight of the private interests at stake. The court noted that in *Walters*, this Court had emphasized that VA benefits are awarded on the basis of disability rather than need, which reduced their weight in the analysis of the process that was due. Pet. App. 23a. Although black lung benefits are likewise awarded on the basis of disability, not need, the court below concluded that the interest in obtaining black lung benefits deserved a weight comparable to the strong interest, recognized in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), in

retaining subsistence welfare benefits. Pet. App. 23a-24a.

Considering those factors, the court concluded that "the system as currently administered denies claimants for black lung benefits property without due process of law by severely restricting their right to obtain representation by competent counsel." Pet. App. 28a; *id.* at 24a. The court also relied on an "independent" due process theory for invalidating the fee system: the fee system effectively denies "qualified claimants the procedural safeguards provided by Congress that are essential to vindicate the right to benefits also granted by Congress." *Id.* at 25a. The court found it "fundamentally unfair" for the government "to confer a right with one hand, and take it away with the other hand." *Id.* at 24a.[5]

b. Two justices dissented. Pet. App. 33a-36a. The dissenters stated that the majority had resolved a constitutional question never raised below, and, as a consequence, "there is no factual record developed." *Id.* at 33a. In particular, the dissent contended that "[t]he ex parte affidavits" of attorneys practicing in the black lung field were "woefully inadequate" to sustain the majority's finding that the black lung fee system deprived claimants of access to counsel. *Ibid.*

4. Recognizing that its decision "involved an important question of federal law," the majority invited the Department of Labor to intervene as a party. Pet. App. 30a. In response, the Department

[5] Although not purporting to direct the Department of Labor to adopt any particular fee regulations, the court suggested that the Department "could provide for a contingent fee," or could use a "multiplier * * * to enhance the 'normal' hourly fee to compensate for the risk of loss." Pet. App. 25a.

of Labor intervened, supplemented the record, and petitioned for rehearing; however, the petition for rehearing was denied. *Id.* at 37a-41a. In a brief opinion, the court rejected the Department's arguments that the fee system advances important government interests and does not unduly hinder black lung claimants in obtaining counsel.

As to the factual record, the Department presented statistics regarding the outcome of recent black lung cases presented before ALJs. The statistics indicated that claimants had representatives in 92% of cases resulting in an ALJ's award or denial of benefits. These claimants prevailed 29% of the time. In the remaining 8% of cases, the claimants proceeded pro se, and prevailed 11.6% of the time. Without commenting on the overwhelming rate of representation at the ALJ level as evidenced by these figures, the court read the statistics to mean only that claimants with counsel "have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se*." Thus, the court concluded, the Department "has simply reinforced with more elaborate statistics the conclusion that we reached in the original opinion—namely, that a claimant's chance of prevailing when he is represented by counsel is substantially higher than when he appears *pro se*." Pet. App. 40a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The system for awarding attorney's fees in the black lung program does not violate the procedural due process rights of claimants. In reaching the contrary conclusion, the court below misapplied the due process analysis set forth in *Mathews* v. *Eldridge*,

424 U.S. 319, 349 (1976), and used in *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 319-320 (1985). In *Walters*, this Court held that the $10 limitation on fees for an attorney in VA benefits proceedings was consistent with procedural due process. Applying the analysis of *Mathews* and *Walters*, and giving due deference to Congress's purposes in enacting the black lung program and to the actions of the Department of Labor in administering it, the same conclusion follows here.

A. In addressing procedural due process claims, statutory procedures as well as those formulated by the administrative agencies are presumed to be constitutional. The black lung program, a massive administrative enterprise, triggers both grounds for deference. Congress determined to regulate black lung attorney's fees and entrusted administration of the black lung program to the Department of Labor. Substantial weight attaches both to Congress's policy choice—to protect black lung claimants against sharing an award with an attorney—and to the Department of Labor's considered judgment that the program is being administered fairly. At a minimum, therefore, it would take a substantial evidentiary showing of the inadequacy of the current fee system to warrant a holding that the system unconstitutionally denies claimants access to counsel. The court below, however, failed to apply those principles and consequently erred in its due process analysis.

B. The touchstone of procedural due process is "fundamental fairness," *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24 (1981), in providing "an opportunity [to be heard] at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*,

380 U.S. 545, 552 (1965). Three distinct factors bear on the adequacy of a particular procedure: (1) the private interest that will be affected, (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or alternative procedural safeguards, and (3) the government's interest in adhering to the present system, including the fiscal and administrative burdens the additional requirements would entail. *Mathews*, 424 U.S. at 335. While recipients of black lung benefits have a "property" interest in continuing to receive benefits to which they are entitled under the statute, this interest is adequately protected under the current system.

1. The black lung fee system provides for an agency-approved award of a reasonable attorney's fee to a prevailing claimant's counsel, shifted to the payor of benefits. The award becomes enforceable when a benefits award is final. 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating 33 U.S.C. 928(c)); 20 C.F.R. 725.362-725.367. The policy underlying those provisions is entitled to great weight. Congress's purpose in regulating claimants' attorney's fees is to protect black lung claimants from improvident agreements that needlessly deplete their benefits. The court below, however, failed to credit the importance of that policy. It also ignored the increased cost to the government and complication of administrative proceedings that would result from a systematic effort to increase attorney's fees.

2. The second *Mathews* factor is the risk of an erroneous result under the procedures currently being used, and the probable value of other procedural safeguards. Under *Walters*, 473 U.S. at 326, it would take an "extraordinarily strong showing" on these

points to establish the unconstitutionality of the black lung fee regulation system. No such showing was made here.

The court's pivotal finding—that the fee system has produced a shortage of lawyers for black lung cases—lacks any adequate foundation in the record. The record contains no statistics about the rate of representation, other than the Department of Labor's showing that 92% of claimants receiving an award or denial of benefits from an ALJ were represented. The court relied on several statements by attorneys that the compensation in the black lung program was inadequate, but such self-serving "anecdotal evidence" cannot sustain findings about the operation of vast federal programs. Even assuming that attorneys are presently unavailable for substantial numbers of claimants, the court overrated the probable value of changes to the attorney's fee system as a corrective measure.

A variety of procedures in the current program protect pro se claimants from an erroneous denial of benefits. Most importantly, deputy commissioners must assist claimants in gathering evidence; ALJs must ensure that a pro se claimant can adequately proceed without counsel; and the Benefits Review Board will independently review the record, without requiring pro se claimants to file a brief. Although the black lung program is not intended to function as informally as the VA benefits system at issue in *Walters*, existing procedures substantially cushion the difficulties that pro se claimants might otherwise encounter in seeking black lung benefits.

This Court's cases establish that access to the services of a lawyer—whether retained or appointed—is not essential in all cases in order to ensure a fair

proceeding. When the interest at stake is an entitlement to government benefits—even one that qualifies as "property"—the Court has never held that due process requires the presence of counsel in a particular proceeding in order to guarantee fundamental fairness. In *Walters*, the Court specifically rejected the contention that the Fifth Amendment entitles a claimant in a VA benefits proceeding to pay for counsel with his own funds. Against that background, the court below clearly erred in concluding that black lung proceedings are, across-the-board, constitutionally inadequate absent the presence of counsel.

3. *Mathews*' third and final factor is the private interest affected. Here, as in *Mathews* and *Walters*, the interest is in retaining disability benefits. Unlike the subsistence welfare benefits involved in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), such disability entitlements are not awarded on the basis of indigence and are complemented by other forms of government aid; accordingly, they do not carry compelling weight in the due process analysis.

4. Applying the three *Mathews* factors, the balance decidedly tips in favor of the black lung fee system's constitutionality. The governmental interest is important, while changes to the attorney's fee system would be both administratively difficult to effect as well as costly. Moreover, current procedures contain adequate safeguards to protect pro se claimants. Finally, the claimants' interest in the receipt of non-subsistence disability benefits does not require invalidation of the fee regime as a means of enticing attorneys to enter (or remain involved in) the system.

C. The court below suggested, almost in passing, an alternative theory of due process that the fee system is invalid because it "effectively denies claimants the

right to benefits granted by Congress," which the court believed to be "fundamentally unfair." Pet. App. 24a. That analysis is flawed. To the extent that benefits conferred by Congress are protected by the Fifth Amendment, the measure of the process that is due is defined by consideration of the *Mathews* factors.

Respondent also argues that black lung claimants have a liberty interest in consulting with counsel about a claim. Br. in Opp. 6. Any such "liberty" interest, however, is coextensive with the claimant's interest in effectively presenting a claim for black lung benefits. Cf. *Walters*, 473 U.S. at 335. Consequently, the asserted liberty interest in retaining counsel has no "independent significance," *ibid.*, and does not enhance the underlying due process "property" claim.

ARGUMENT

A. The Department of Labor's Attorney's Fee Regulations, As Applied, Are Presumed To Be Constitutional, And That Presumption Is Not Overcome Absent A Substantial Showing That The Black Lung Program Inadequately Protects The Due Process Rights of Claimants

An Act of Congress challenged on procedural due process grounds is presumed to be constitutional, and a challenger bears the heavy burden of demonstrating its unconstitutionality. See *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 319-320 (1985); cf. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). The Court has applied a similar presumption of constitutionality in reviewing procedural due process challenges to procedures formulated and applied by administrative

agencies. *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976); *Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982). That deference flows from the recognition that "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." *Mathews*, 424 U.S. at 349.

The constitutional adequacy of the black lung attorney's fee system must be judged in light of these principles. The black lung program is of considerable dimensions. At the time of enactment of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, Tit. IV, 83 Stat. 792-798, Congress anticipated that there would be approximately 100,000 afflicted miners. See *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 n.1 (1976). As of December 31, 1974, however, more than one-half million benefits claims had been filed under the temporary Part B provisions administered by the Department of Health, Education, and Welfare (see note 1, *supra*). 428 U.S. at 8 n.7. After major amendments to the statute in 1978, the Department of Labor experienced a surge in the number of filed claims.[6] This resulted in part from Congress's direction to reopen claims that had been denied before the effective date of the 1978 amendments. See 30 U.S.C. 945. The 1978 amendments also dramatically enhanced the rate of approval of claims, see Lopatto, *The Federal Black*

[6] In 1978, Congress amended the Black Lung Benefits Act, Pub. L. No. 92-303, 86 Stat. 150, by enacting the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11, and the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95.

Lung Program: A 1983 Primer, 85 W. Va. L. Rev. 677, 693 (1983), and resulted in severe backlogs in their processing. See *Report to the Honorable Donald J. Pease, House of Representatives, by the U.S. General Accounting Office, Adjudication of Black Lung Claims by Labor's Office of Administrative Law Judges and Benefits Review Board* App. I, at 7 (Oct. 26, 1984) (1978 amendments to the black lung statute required the reopening of about 200,000 claims).

In 1981, Congress responded to these problems by tightening the eligibility criteria applicable to post-1981 claims. The Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, §§ 202(a), 203(b), 95 Stat. 1643, repealed, among other things, three statutory presumptions in favor of claimants, a provision for benefits where a miner's death was not due to pneumoconiosis, and a prohibition on the rereading of certain x-rays. See 127 Cong. Rec. 31,747-31,748 (1981). In enacting those changes, Congress considered two General Accounting Office reports indicating that more than 80 percent of black lung claims approved under prior law "were based on inadequate or conflicting medical evidence." *Id.* at 31,977-31,978 (remarks of Sen. Hatch). The 1981 amendments were intended to "restor[e] [the black lung program] as a disability program, and no longer a pension program." *Id.* at 31,978. Under the 1981 amendments, Congress contemplated a drastically reduced approval rate "in the neighborhood of 4 percent." *Id.* at 31,979 (remarks of Sen. Nickles). In light of Congress's deliberate decision to impose more stringent criteria for black lung benefits, and considering the processing backlogs that the program has experienced, it is no surprise that some attorneys have found it not worthwhile to represent black lung claimants. The court

below, however, determined that black lung attorneys were nearly unavailable in West Virginia, and assigned the responsibility for that situation, virtually entirely, to the system for awarding attorney's fees.

The court's process of analysis is incompatible with a proper approach to judging the constitutional adequacy of a large-scale federal program. The decision to regulate black lung attorney's fees belongs to Congress, see 33 U.S.C. 928(a), and that body has entrusted the administration of the fee system to the Department of Labor, 30 U.S.C. 932(a), 936(a) (1982 & Supp. V 1987). Those legislative actions should have led the court below to give substantial weight to Congress's policy choice—to protect black lung claimants against the payment of attorney's fees (*Walters*, 473 U.S. at 326)—and to accord deference to the Department of Labor's judgment that the program is being administered fairly (*Mathews*, 424 U.S. at 349). At a minimum, that deference should have entailed an insistence that a substantial evidentiary showing of the current system's inadequacy be made before concluding that it unconstitutionally denies claimants access to counsel. Cf. *Walters*, 473 U.S. at 330.

On several different levels, however, the court's approach departed from those principles. The court gave little or no credence to the policy adopted by Congress to regulate fees. It relied on anecdotal evidence, compiled for the first time at the appellate level, to conclude that the attorney's fee system discourages attorneys from representing black lung claimants. And it found, without review of any particular black lung proceeding or any discussion of the law regarding the right to counsel, that the presence of an attorney is at all times a necessary component of due process to protect the rights of claimants. The

deficiencies in the evidentiary record alone would require rejection of the court's conclusions. Cf. *Schweiker* v. *McClure*, 456 U.S. at 196 n.10. However, as we show below, the court's incorrect approach also resulted in misapplication of the established framework for analyzing due process claims.

B. Applying Principles of Deference, And the *Mathews* v. *Eldridge* Balancing Test, The Black Lung Fee System, As Applied, Does Not Violate the Due Process Clause

The touchstone of procedural due process is "fundamental fairness," *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24 (1981), in providing "an opportunity [to be heard] at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). The initial step in the due process inquiry is to identify the interest that the Constitution is alleged to protect. We agree with the court below (Pet. App. 23a) that current recipients of black lung benefits have a protected "property" interest in continuing to receive benefits to which they are entitled under the statute. See *Walters*, 473 U.S. at 320 & n.8; *Atkins* v. *Parker*, 472 U.S. 115, 128 (1985); *Mathews*, 424 U.S. at 332.[7] Addition-

[7] We assume, for purposes of this brief, that respondent had standing to raise the due process rights of his clients with respect to the fee arrangements at issue here. Cf. *Caplin & Drysdale, Chartered* v. *United States*, 109 S. Ct. 2646, 2651 n.3 (1989) (defendant's attorney had *jus tertii* standing to advance his client's constitutional objections to the application of drug forfeiture statute to attorney's fees). We note, however, that in a civil action by an attorney challenging the constitutionality of the black lung fee system, the district court dismissed the action on the basis that the attorney lacked standing to assert the rights of claimants. *Howell* v. *Dole*, No. 88-303 (E.D. Ky. Oct. 13, 1989).

ally, the court appeared to believe that applicants for benefits, who have not yet been found eligible, possess such a "property" interest. Pet. App. 23a & n.31. This Court has never held that applicants for government benefits have a protected property interest under the Fifth Amendment. *Lyng* v. *Payne*, 476 U.S. 926, 942 (1986). Because, however, the court below correctly noted (Pet. App. 23a & n.31) that at least one of respondent's clients was receiving benefits, the Court need not determine in this case if black lung *applicants* have a property interest that brings into play the protection of the Fifth Amendment. See *Walters*, 473 U.S. at 320 n.8.

"Once it is determined that due process applies, the question remains what process is due." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). To guide the inquiry into the adequacy of a particular procedure, the Court has considered three distinct factors: (1) the private interest that will be affected, (2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or alternative procedural safeguards, and (3) the government's interest in adhering to the present system, including the fiscal and administrative burdens the additional requirements would entail. *Mathews*, 424 U.S. at 335; see *FDIC* v. *Mallen*, 108 S. Ct. 1780, 1788 (1988); *Walters*, 473 U.S. at 321; *Schweiker* v. *McClure*, 456 U.S. at 198; *Lassiter*, 452 U.S. at 27. Together, those factors establish that the fee system is constitutional.

1. *The Governmental Interest In The Regulation of Black Lung Attorney's Fees Is Substantial*

The black lung fee system provides for an agency-approved award of a reasonable attorney's fee, shifted to the payor of benefits, which is enforceable when a benefits award is final. Legal fees are not ap-

proved unless a claimant prevails. 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating 33 U.S.C. 928(c)); 20 C.F.R. 725.362-725,367; see p. 4, *supra*. Congress's purpose in regulating the fees payable to attorneys for black lung claimants is to protect claimants from improvident agreements that needlessly deplete their benefits. This Court long ago recognized the validity of such a policy. In *Yeiser* v. *Dysart*, 267 U.S. 540, 541 (1925), the Court upheld the provision in the Nebraska worker's compensation laws requiring approval of the attorney's fees charged a claimant. The Court noted that legislatures may protect claimants "against improvident contracts, in the interest not only of themselves and their families but of the public." *Ibid.* The Court likewise upheld the statutory protection of VA benefits awards against dissipation on attorney's fees in *Walters*, 473 U.S. at 323. While such regulation can be characterized as "paternalism" (*ibid.*), it is beyond doubt that Congress may pursue that policy as a proper legislative purpose. Cf. *Ferguson* v. *Skrupa*, 372 U.S. 726, 728-730 (1963); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955). "The paternalistic interest in protecting the [claimant] from his own improvidence would unquestionably justify a rule that simply prevented lawyers from overcharging their clients." *Walters*, 473 U.S. at 365 (Stevens, J., dissenting).[8]

[8] Indeed, in another major entitlement program, Congress has expressed the same policy, albeit in different form from the black lung statute. In regulating the attorney's fees that can be paid by Social Security old age, survivor, and disability claimants, Congress placed a ceiling on attorney's fees of 25% of a claimant's back benefits award. 42 U.S.C. 406(b); see S. Rep. No. 404, 89th Cong., 1st Sess. Pt. 1, at 122 (1965). See *Hopkins* v. *Cohen*, 390 U.S. 530, 534-535 & n.6 (1968).

The regulation of attorney's fees in the black lung program stems from Congress's incorporation of Section 28 of the Longshore and Harbor Workers' Compensation Act (LHWCA) (33 U.S.C. 928 (1982 & Supp. V 1987)) into the Black Lung Benefits Act. The LHWCA has protected claimants against imprudent fee arrangements since its enactment in 1927. Act of Mar. 4, 1927, ch. 509, § 28, 44 Stat. 1438. Section 28 of the LHWCA, as originally enacted, provided that no one may charge a claimant a fee unless approved by the appropriate court or administrative officer. *Ibid.* This provision was specifically designed to protect a class of unsophisticated workers who had been subjected to the "sharp practices" of people who represented them. See *Hearing on H.R. 9498 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 40 (1926); *Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary*, 69th Cong., 1st Sess. 68-69 (1926).[9] The provision was modeled on an early New York worker's compensation law, see *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 466 (1968), that was intended to "insure as large a return to the injured workman in compensation for injuries incurred in the course of his employment as possible." *In re Fisch*, 188 A.D. 525, 177 N.Y.S. 338, 341 (1919).

The same reasons that prompted the regulation of attorney's fees in the LHWCA context are equally

[9] The regulation of fees was contained in both of the bills that led to the 1927 LHWCA, and Congress reaffirmed that policy when it added a fee-shifting provision to the LHWCA in 1972. See Pet. 13-14 n.3 (discussing legislative history of LHWCA).

applicable here. The Black Lung Benefits Act has included the LHWCA fee provision since its enactment in 1969. See Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, Tit. IV, § 422, 83 Stat. 796.[10] Its manifest purpose is "to ensure that a claimant's disability benefits not be eroded by legal fees." *Bethenergy Mines Inc.* v. *Director, OWCP*, 854 F.2d 632, 637 (3d Cir. 1988). As with LHWCA claimants, Congress could reasonably conclude that black lung claimants—consisting primarily of elderly coal miners and their eligible survivors—are susceptible to exploitation and require protection against depletion of their benefits. Cf. U.S. Department of Labor, Employment Standards Admin., *A Sample Survey of All Sources of Both Monetary and Non-Monetary Income of Black Lung Beneficiaries* 14 (1983) [hereinafter *Sample Survey*] (while some widows have more education, three-fourths of miners did not attend high school). Congress has also been made aware that in the early years of the black lung system certain lawyers were "soaking coal miners with fat fees for very little work." House Comm. on Education and Labor, 96th Cong., 1st Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977*, at 1 (Comm. Print 1979) (statement of Rep. Hechler).

[10] The fee provisions and other portions of the LHWCA were applied to Part C of the black lung statute in conference. See H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 89-91 (1969). During debate on the conference report, supporters of the legislation uniformly stated their intent to incorporate into Part C the enumerated LHWCA provisions. See 115 Cong. Rec. 39,707, 39,709 (1969) (Rep. Perkins); *id.* at 39,712-39,713 (Rep. Dent); *id.* at 39,718 (Rep. Burton); *id.* at 39,996 (section-by-section analysis of the Conference Report, presented by Sen. Williams); *id.* at 39,999 (Sen. Javits).

Indeed, Congress's concerns have proved to be well-founded, as some attorneys have attempted to collect amounts from claimants contrary to the statute. See, *e.g.*, *In re Shoemaker*, 11 Black Lung Rep. (MB) 3-145 (ALJ 1988) (attorney charged claimant $4480.00, then submitted fee petition for additional $1987.50); *Taylor* v. *Director, OWCP*, 11 Black Lung Rep. (MB) 3-184, 3-185 (ALJ 1988) (attorney collected $2,015.95 at hourly rate of $120 from Director, but required claimant to agree "to a fee of 25% of accumulated benefits, or $3,000 or $120 per hour, whichever was the greatest, plus expenses"). See also *Committee on Professional Ethics and Conduct* v. *Christoffers*, 348 N.W.2d 227 (Iowa 1984).[11]

The court below failed to credit Congress's intention to protect black lung claimants against depletion of benefits by sharing them with an attorney. The court gave that congressional policy short shrift because of its view that "under the current system the claimant seldom has an award to share." See Pet. App. 21a. Yet, the low approval rate of claims has nothing to do with the legitimacy and importance of Congress's policy choice to preserve a benefits award for a claimant, not his attorney.

Changing the fee system would impair other government interests. The court's suggestion (Pet App. 25a) to allow contingent fees based on a percentage

[11] Respondent, for example, generally ignored the possibility of having the Trust Fund or a coal mine operator pay his attorney's fees, instead requiring claimants to share their benefits with him. See generally R. 4, pt. 1 (stipulation before Committee on Legal Ethics). On the two occasions where respondent submitted fee petitions, he also collected unapproved extra fees from the claimants who retained him. See Pet. App. 46a (claimant DeMotto); *id.* at 48a; R. 4, pt. 2 (claimant Hedrick).

of the claimant's award would obviously frustrate Congress's purpose of preserving the pool of benefits for the claimant. See *Lebel* v. *Bath Iron Works Corp.*, 544 F.2d 1112, 1113 (1st Cir. 1976) (per curiam). Moreover, a rule requiring the Trust Fund or a responsible operator to pay attorney's fees calculated as a set percentage of an award would likely not satisfy this Court's standards for analysis of whether a particular fee award is "reasonable." Cf. *Blanchard* v. *Bergeron*, 109 S. Ct. 939 (1989) (a "reasonable" attorney's fee under 42 U.S.C. 1988 is not controlled by the contingency arrangement between counsel and the plaintiff).

The court's alternative suggestion (Pet. App. 25a) —that the Department adopt a statewide contingency "multiplier" to compensate claimants' attorneys for their risk of loss—would impose additional costs on operators and, more particularly, on the Black Lung Disability Trust Fund, which is already some $3 billion in debt to the federal treasury. See *id.* at 39a. Such increased costs, while not determinative, receive some weight in the due process analysis. *Mathews*, 424 U.S. at 348.

More fundamentally, across-the-board contingency multipliers have never received the unqualified approval of this Court. The black lung statute limits fee shifting to contested cases where a claimant prevails and further requires that any fee charged be "reasonable." See 33 U.S.C. 928(a); 20 C.F.R. 725.367. In *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), the Court considered the permissibility of risk enhancement under the Clean Air Act fee-shifting provision, 42 U.S.C. 7604(d). The plurality opinion opposed any enhancement for risk of loss, noting it would "force[] losing defendants to compensate plaintiff's

lawyers for not prevailing against defendants in other cases"; alternatively, the plurality would allow such enhancement only in "exceptional cases." 483 U.S. at 724-725, 728 (White, J., joined by Rehnquist, C.J., and Powell and Scalia, JJ.). Justice O'Connor would have found risk enhancement permissible only when necessary to attract competent counsel for a "class" of cases in a "particular market," and would have required a showing that the plaintiff would encounter " 'substantial difficulties in finding counsel' " absent such enhancement. *Id.* at 733 (concurring in part and concurring in the judgment). The four dissenting Justices, in contrast, urged the award of contingency premiums under a different formula. *Id.* at 735-755 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ.). Thus, while five Justices of this Court have endorsed some form of contingency enhancement—in the context of fee-shifting statutes designed to encourage "private attorneys general"—the standards governing any such enhancement are not at all settled.[12]

Quite apart from the difficulty in crafting a permissible formula for enhancing fees for risk of loss, the determination of an appropriate multiplier can be expected to produce expensive and burdensome

[12] The court below distinguished *Delaware Valley* by noting (Pet. App. 27a) that under the fee-shifting provision before the Court in that case, plaintiffs were not barred from entering into supplementary fee arrangements with their counsel. That assumption, however, is by no means certain. The question whether, under a typical fee-shifting statute (such as 42 U.S.C. 1988), plaintiff's counsel can collect from the plaintiff the difference between a contingency fee and a "reasonable" fee paid by the defendant is presently before the Court in *Venegas* v. *Mitchell*, cert. granted, 110 S. Ct. 45 (1989).

litigation. "'[P]inpointing the degree of risk [is] one of the most subjective and difficult components of the fee computation process,'" 483 U.S. at 732 (O'Connor, J., concurring in part and concurring in the judgment). Consequently, courts have noted that "determining and applying the contingency multiplier would present vast administrative problems." *Student Public Interest Research Group* v. *AT&T Bell Laboratories*, 842 F.2d 1436, 1452 (3d Cir. 1988). See also *McKenzie* v. *Kennickell*, 875 F.2d 330 (D.C. Cir. 1989). The government has a substantial interest in avoiding additional complexities in administering the black lung program. The system is already deeply backlogged and is ill-equipped to gather "extensive market information" about attorney's fees in order "to calculate how the market accounts for contingency cases as a class." *Student Public Interest Research Group*, 842 F.2d at 1452. Adopting the contingency multiplier approach as a routine ingredient of fee litigation runs counter to this Court's admonition that "[a] request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983).

2. *Changes In The Regulation of Attorney's Fees Are Not Necessary To Reduce The Probability of Error Under the Present System*

Given the weight of the government's interests, as the dissent below recognized, "'[i]t would take an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law.'" Pet. App. 34a-35a (quoting *Walters*, 473 U.S at 326). No such "extraordinarily strong showing" was made.

a. The court's pivotal finding—that the fee system has produced a shortage of lawyers for black lung cases—lacks any adequate foundation in the record. Apart from the Department of Labor's submission, discussed below, there were *no* statistics in the record regarding the rate of representation of black lung claimants. Nor was there adequate information suggesting that most claimants were encountering substantial difficulty in attracting competent counsel. Cf. *Delaware Valley Citizens' Council*, 483 U.S. at 731 (plurality opinion) ("Before adjusting for risk assumption, there should be evidence in the record * * * that without risk enhancement the plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market."); *id.* at 733 (O'Connor, J., concurring in part and concurring in the judgment) (same). Rather, the court relied solely on a few attorney affidavits, together with selective citations from congressional testimony, expressing a general unhappiness with the fee system and a belief that there was a consequent shortage of attorneys. Pet. App. 16a-20a. The court entirely overlooked, however, other reports from the same sources downplaying the significance of attorney's fees. For example, in the congressional hearing cited by the court, an attorney who had represented coal miners in black lung cases since 1960 disagreed with the assertions that the attorney's fee system deterred black lung lawyers from taking cases. He observed: "Lawyers never can be paid enough. I honestly think that, to a degree, [criticism of the fee system] is a red herring, and most of the attorneys that have been in this practice, while we have grumbled about the fee arrangement, con-

tinue to be in the practice." *Investigation of the Backlog in Black Lung Cases: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 45 (1985) [hereinafter *1985 Hearings*]. See also *id.* at 103-104 (United Mine Workers attorney expressing the view that difficulties in obtaining counsel flow primarily from tightened criteria for an award of benefits).

The type of impressionistic evidence in this record is not sufficient to support a finding of unconstitutionality for an administrative program receiving 7,000 or 8,000 new claims a year. Such "anecdotal evidence" cannot sustain findings about the operation of vast federal programs. See *Walters*, 473 U.S. at 324 n.11. The court's analysis is particularly flawed in light of the statistics submitted by the Department of Labor. Although not comprehensive, those statistics showed a 92% rate of representation at the ALJ level in cases resulting in an award or denial of benefits.[13] That showing is hardly consistent with the view that the fee system has virtually eliminated the pool of lawyers willing to take black lung cases.[14]

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[13] See R. 27 (Affidavit of Jane G. Denney). The information submitted to the court was compiled in connection with the Department of Labor's petition for rehearing and reflects the evaluation of ALJ determinations in cases filed during fiscal year 1987. The Department advises us that it does not generally prepare statistics on the rate of representation in black lung cases. Recently, the General Accounting Office, in connection with a forthcoming report, has requested more detailed information about the rate of representation before the Board in black lung cases.

[14] It is also significant that at congressional hearings, attorneys have presented to lawmakers the same type of arguments that were presented to the court here about the alleged impact of the fee system on the availability of competent counsel. See *1985 Hearings*, *supra*. Despite that information, and continued congressional attention to the problem, see *Oversight Hearing on the Administration of the Black Lung Program: Hearing Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 100th Cong., 2d Sess. (1988), Congress has never made legislative "findings" that the attorney's fee system bears responsibility for any difficulties in arranging for representation in the black lung program. Nor has Congress revised the attorney's fee system, as it was urged to do, to take account of the deficiencies perceived by some black lung attorneys. In light of Congress's superior fact-finding ability regarding the operation of massive benefits programs, *Walters*, 473 U.S. at 330-331 n.12, the court below should have given consideration to Congress's "refusal to impose on the Secretary" a different set of fee regulations than currently prevails. Cf. *Heckler* v. *Day*, 467 U.S. 104, 112 (1984) (district court erred in issuing statewide injunction against the government to comply with mandatory deadlines for disability determinations in light of Congress's awareness of the problem and consistent refusal to impose similar deadlines).

b. Even assuming that attorneys are presently unavailable for substantial numbers of claimants, the court overrated the probable value of changes to the attorney's fee system as a corrective measure. First of all, in light of the flexible criteria governing the award of fees, it is doubtful that the current fee system is the cause of any shortage of attorneys. Black lung fees are generally computed on the attorney's usual and customary rate when the work was performed. Applying that approach, "the scale upon which lawyers are generally compensated" in black lung cases has recently been from $60 to $120 per hour. *Alexander* v. *Director, OWCP*, 12 Black Lung Rep. (MB) 3-566 (ALJ 1988) (awarding $70

an hour for new attorney and $135 an hour for senior associate in large law firm). The information presented to the court below was consistent with that range. See Br. in Opp. App. A24 (affidavit of Frederick Muth that attorneys may expect $85 an hour at the deputy commissioner level and up to $125 an hour from ALJs and the Board). In some cases, ALJs have boosted fees by using the rates prevailing at the time of the award. *Cloos* v. *Director, OWCP*, 8 Black Lung Rep. (MB) 3-55 (ALJ 1985) (1983 rates of $100 an hour awarded for attorney retained in 1976 for work in 1981 and 1983). Cf. *Missouri* v. *Jenkins*, 109 S. Ct. 2463, 2468-2469 (1989). That level of compensation is hardly so inadequate as to destroy all attorney interest in black lung cases. Cf. *Superior Court Trial Lawyers Ass'n* v. *FTC*, 856 F.2d 226, 228 (D.C. Cir. 1988) (from 1970 to 1983, Criminal Justice Act attorneys in the District of Columbia were paid $30 an hour for court time and $20 per hour for office time), cert. granted, 109 S. Ct. 1741 (1989).

Of course, an award of attorney's fees is not enforceable until a black lung benefits award is final. A reasonable hourly rate, however, will account for the possibility of such delay.[15] See *Missouri* v. *Jen-*

[15] An enhancement to an attorney's customary hourly rate to compensate for delay, insofar as it is seen as an award of interest, may not be available against the United States absent congressional consent. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). In cases arising before *Shaw*, courts found it unnecessary to decide whether an award of attorney's fees against the Trust Fund is an award against the United States because they construed the statutory incorporation of the LHWCA fee-shifting provision, in conjunction with 30 U.S.C. 934(a), to authorize payment of attorney's fees from the Trust Fund. See, *e.g.*, *Director, OWCP* v. *Black Diamond*

kins, 109 S. Ct. at 2468-2469. In the black lung program, the Department assumes that the attorney's customary hourly rate incorporates a component for delay. See *Hobbs* v. *Director, OWCP*, 820 F.2d 1528, 1529 (9th Cir. 1987) (the Board reasonably assumes that "any potential devaluation of a fee award as the result of delay [in LHWCA cases] is comprehended in the basic fee structure of the attorneys providing services"); *Thompson* v. *Potashnick Constr. Co.*, 812 F.2d 574, 577 (9th Cir. 1987) (describing Board policy that hourly rates adjust for anticipated delays). Given the prevalence of delayed payment in the black lung field, as in the LHWCA context, *Hobbs*, 820 F.2d at 1529, an assumption that hourly rates are set with that prospect in mind is entirely reasonable.[16]

Courts have also recognized that an attorney's hourly rate may incorporate an adjustment for risk of loss. See, *e.g.*, *Cotter* v. *Bowen*, 879 F.2d 359, 363 (8th Cir. 1989). Cf. *Delaware Valley*, 483 U.S. at 726 (plurality opinion) ("it may well be that using a contingency enhancement is superfluous and unnecessary under the lodestar approach to setting a fee").

Coal Mining Co., 598 F.2d 945, 948-949 (5th Cir. 1979); *Republic Steel Corp.* v. *United States Department of Labor*, 590 F.2d 77, 82 & n.6 (3d Cir. 1978). Whatever the status of the Trust Fund, which is a federally administered Treasury account derived mainly from an excise tax on coal (see note 2, *supra*), it "may not be comparable" to other federal agencies or corporations. *Black Diamond*, 598 F.2d at 948 n.3.

[16] To the extent that claimants' attorneys desire a different or more explicit treatment of delay, they can of course litigate the issue under the black lung fee system. See also *Workman* v. *Director, OWCP*, 6 Black Lung Rep. (MB) 1-1281, 1-1283 (Ben. Rev. Bd. 1984) (attorney's time litigating a fee award can be compensated).

The Board has applied this principle under the black lung statute, stating that an hourly rate is "manifestly inadequate" if it does not compensate for risk of loss. See, *e.g.*, *Taylor* v. *Director, OWCP*, 6 Black Lung Rep. (MB) 1-427 (Ben. Rev. Bd. 1983) ($50 an hour at initial stages of the case is manifestly inadequate for attorney who practices in West Virginia); *McKee* v. *Director, OWCP*, 6 Black Lung Rep. (MB) 1-233, 1-237 (Ben. Rev. Bd. 1983) (vacating fee award). Cf. *Esselstein* v. *Director, OWCP*, 676 F.2d 228 (6th Cir. 1982) (per curiam) (no abuse of discretion to award hourly rate of $65, based on $50 market rate in attorney's county plus $15 for risk of loss, even though national hourly rate might be higher).[17]

An additional reason for doubting that the fee system has driven lawyers from the black lung field is that there is an entirely separate disincentive to representation: the dramatically reduced claims-approval rate under revisions to the black lung statute. Under the 1981 amendments, as the court noted (Pet. App. 14a), the approval rate for claims at the initial adjudicatory level has dropped to approximately 5 percent.[18] This factor was prominently mentioned in

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[17] Respondent seems to have understood that proposition because he cited risk of loss as one of the factors in determining an hourly rate of $125 that he requested from an ALJ. See R. 4, pt. 2 (claimant Hedrick). The ALJ noted that respondent's total requested fee, divided by the number of hours requested, in fact produced a rate closer to $75, which the ALJ awarded. *Ibid.*

[18] Congress's adjustment of the eligibility standards, of course, presents no due process problem. See *Bowen* v. *Gilliard*, 483 U.S. 587, 598 (1987); *Atkins* v. *Parker*, 472 U.S. 115, 129-130 (1985).

the attorney affidavits on which the court relied in concluding that the fee system discouraged attorney representation. See Br. in Opp. App. A3-A4, A11-A12, A24, A27, A30. With such limited chances of success, the interest of some attorneys has undoubtedly waned. That result, however, cannot rationally be attributed to the characteristics of the fee system.

Experience under earlier versions of the black lung statute confirms that the current low approval rate—and not the delay in the payment of fees—is the primary reason for any reduction in the number of claimants' attorneys. Delays also existed for claims adjudicated under earlier versions of the law that were far more favorable to claimants. Nevertheless, attorneys were widely available to handle such claims. See *1985 Hearings*, *supra*, at 103.

c. In analyzing the risk of error in light of the fee system, it is relevant to consider the existence of procedures that protect claimants from an erroneous denial when a lawyer is not present. Cf. *Walters*, 473 U.S. at 330. While the black lung program is not intended to function as informally as the VA benefits system at issue in *Walters*, the Department of Labor nonetheless uses a variety of mechanisms to reduce the risk of error for pro se claimants.

Under regulations governing the black lung program, the initial stage of a claim is submission to an appropriate office of the Department of Labor, either directly or through the Social Security Administration. 20 C.F.R. 725.303(a)(1). That office must give assistance to claimants in filling out the requisite forms. 20 C.F.R. 725.304(a). Following the filing of a claim,

> [e]ach miner * * * shall be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation. Accordingly, the Office [of Workers' Compensation Programs] shall assist each claimant in obtaining the evidence, including medical evidence, necessary for a complete adjudication of a claim. In the case of a miner's claim, initial medical tests and examinations shall be arranged for the miner by the Office, at no cost to the miner.

20 C F.R. 718.401. The deputy commissioner, who initially determines the claim, is required to give a claimant an opportunity for a pulmonary examination, 30 U.S.C. 923(b); 20 C.F.R. 725.405(b)), at the Trust Fund's expense (20 C.F.R. 725.406(c)); to gather evidence of the miner's employment (20 C.F.R. 725.405(d)); and otherwise to "take such action as is necessary to develop, process, and make determinations with respect to the claim" (20 C.F.R. 725.401). In survivor's cases, the deputy commissioner must also gather "whatever medical evidence is necessary and available" (20 C.F.R. 725.405(c)). The deputy commissioner has authority to schedule an "informal conference in any claim where it appears that such conference will assist in the voluntary resolution of any issue raised with respect to the claim." 20 C.F.R. 725.416(a). At such a conference, the deputy commissioner must inform the claimant about the consequences of any proposed agreement and, if the claimant does not understand it, the deputy commissioner "shall not permit the execution of any stipulation * * * unless it is clear that the best interests of the claimant are served thereby." 20 C.F.R. 725.416(d). If the evidence does not support an initial award of benefits, the

deputy commissioner sends the claimant a letter specifying the reasons for the denial and outlining the precise procedures and time limits for further review. 20 C.F.R. 725.410(c). This form of notice has been held adequate to protect the due process rights of pro se claimants. *Jordan* v. *Benefits Review Board*, 876 F.2d 1455 (11th Cir. 1989). See also *Adams* v. *Harris*, 643 F.2d 995 (4th Cir. 1981).

An appeal from the deputy commissioner's determination may be taken to an ALJ. It is true that the proceedings before an ALJ take place in a more adversarial, trial-type setting. See 20 C.F.R. 725.450-725.457. Nevertheless, there are safeguards to protect against the risk of error for pro se claimants. In any case involving a hearing, an ALJ must determine whether a pro se claimant is able to proceed without an attorney. 20 C.F.R. 725.362(b). In the absence of such a determination, an ALJ's denial of benefits will generally be vacated. See *Shapell* v. *Director, OWCP*, 7 Black Lung Rep. (MB) 1-304 (Ben. Rev. Bd. 1984). Moreover, ALJs as a matter of practice assist pro se claimants in finding attorneys by providing hearing notices that include names and addresses of attorneys who represent black lung claimants and by recommending bar association referral services, unions, legal aid societies, and law schools that may provide clinical programs. See R. 27 (Affidavit of Nahum Litt, Chief ALJ for the Department of Labor).[19] If a claimant wants legal

[19] The Department of Labor originally submitted this affidavit in *Nuckles* v. *Brock*, No. 87-0125-B (W.D. Va.), a due process challenge to the black lung fee system that the district court dismissed on March 4, 1988, essentially for plaintiff's failure to prosecute. The Department resubmitted the affidavit to support its petition for rehearing below.

representation but is unable to retain an attorney in time for a hearing, it may constitute an abuse of discretion, under those circumstances, for an ALJ not to grant a continuance. See *Johnson* v. *Director, OWCP*, 9 Black Lung Rep. (MB) 1-218 (Ben. Rev. Bd. 1986).

Finally, the Benefits Review Board has adopted procedures to provide for a fair review of a pro se claimant's case on appeal. The Board does not require pro se claimants to submit briefs; moreover, it conducts an independent review of ALJ decisions for error. *McFall* v. *Jewell Ridge Coal Corp.*, 12 Black Lung Rep. (MB) 1-176 (Ben. Rev. Bd. 1989) (applying 20 C.F.R. 802.211(e), 802.220); *Antonio* v. *Bethlehem Mines Corp.*, 6 Black Lung Rep. (MB) 1-702 (Ben. Rev. Bd. 1983).

In sum, the Department of Labor has focused on the problem of assuring fairness to pro se claimants and developed regulations designed to protect their procedural rights. These procedures cushion the process for pro se black lung claimants seeking to apply for or retain benefits.

d. This Court has recognized that a lawyer—whether retained or appointed—is not essential in all cases in order to have a fair proceeding; rather, the due process interest in being represented by counsel varies substantially depending upon the particular setting and the competing interests at stake.[20]

[20] In criminal cases, of course, the Sixth Amendment (applied to the States through the Fourteenth Amendment) requires the availability of counsel to all defendants at the trial level, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and through one level of appeal as of right, *Douglas* v. *California*, 372 U.S. 353 (1963). Cf. *Ross* v. *Moffitt*, 417 U.S. 600 (1974) (right to counsel does not apply to discretionary review of intermediate appellate court by state supreme court); *Pennsylvania* v. *Finley*, 481 U.S. 551 (1987) (State has no constitutional obligation to provide counsel for indigent prisoners seeking postconviction collateral relief); *Murray* v. *Giarratano*, 109 S. Ct. 2765 (1989) (same conclusion as to death row inmates).

The Court has applied a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." *Lassiter* v. *Department of Social Services*, 452 U.S. at 26-27; see *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency proceedings). When a person faces a less severe loss of liberty, however, there is no absolute right to counsel; rather, any right to appointed counsel must be established from considerations arising from the facts of a particular proceeding, evaluated on a case-by-case basis. See *Lassiter*, 452 U.S. at 31-32 (parental termination proceeding); *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (probation revocation hearing); *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972) (parole revocation hearing). Cf. *Vitek* v. *Jones*, 445 U.S. 480, 496, 497 (1980) (plurality opinion); *id.* at 499-500 (Powell, J., concurring in part) (hearing regarding involuntary transfer of an inmate to mental institution for treatment). In cases affecting even weaker liberty interests, the government's interest in less formal procedures, considered with the other *Mathews* factors, has led to the conclusion that counsel need not be provided in *any* case. See *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974) (inmate facing prison disciplinary proceedings has no "right to either retained or appointed counsel"); *Goss* v. *Lopez*, 419

U.S. 565, 583 (1975) (students facing short suspensions have no right to "secure counsel").[21]

In cases involving an entitlement to government benefits that qualifies as "property," the Court has never held that due process requires the presence of counsel in order to guarantee fundamental fairness. In *Randolph* v. *United States*, 274 F. Supp. 200 (M.D.N.C. 1967) (per curiam), summarily aff'd, 389 U.S. 570 (1968), the Court affirmed the judgment of a three-judge district court rejecting a due process claim quite similar to that accepted by the court below. The plaintiff in *Randolph* contended that 42 U.S.C. 406(a), which governs the payment of attorney's fees by Social Security claimants, "so effectively discourage[s] attorneys from handling social security cases that the claimants are deprived of the assistance of counsel." 274 F. Supp. at 203. The court reasoned that even if the fee system had the effect ascribed to it, the claim must fail because the court could not "accept the plaintiff's initial premise * * * that claimants for social security benefits have a constitutionally protected right to counsel in pursuing their claims through the administrative procedures of the social security system." *Ibid.*

Indeed, in *Walters*, the Court went further and specifically rejected the claim that the Fifth Amend-

[21] See also *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976) (applying *Wolff* v. *McDonnell, supra*, to a prison disciplinary hearing involving charges of conduct that also violate state criminal law); *Middendorf* v. *Henry*, 425 U.S. 25, 42-48 (1976) (serviceman facing summary court martial has no right to have counsel provided); *Parham* v. *J.R.*, 442 U.S. 584 (1979) (minor facing involuntary civil commitment by a parent has no right to an adversary hearing or, implicitly, counsel).

ment entitles a claimant to pay for counsel with his own funds in a VA benefits proceeding. The Court in *Walters* took note that *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), had interpreted the Due Process Clause to require an evidentiary hearing before the suspension of welfare benefits and had said that while counsel need not be provided, "the recipient [in that hearing] must be allowed to retain an attorney if he so desires." *Id.* at 270. As the Court observed in *Walters*, however, the State in *Goldberg* did not have a policy "against permitting an applicant to divide up his welfare check with an attorney who had represented him in the proceeding." *Walters*, 473 U.S. at 333. Moreover, the *Walters* Court also distinguished *Goldberg* by noting that disability benefits have far lesser "weight" in the due process analysis than welfare benefits, "upon which the recipients in *Goldberg* depended for their daily subsistence." *Ibid.* The Court found that factor "determinative of the right to employ counsel." *Ibid.*[22] Against that background, the court below clearly erred in concluding that black lung proceedings are, across-the-board, constitutionally inadequate without the presence of counsel.[23]

[22] The Court in *Walters* also stated, as an additional means of distinguishing prior cases, that the VA process is designed to work nonadversarily and that "counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding." 473 U.S. at 333. *Walters*, however, had no occasion to consider the application of the Due Process Clause to those types of proceedings, nor to define with precision what factors might tip the due process balance in favor of an unregulated right to retain counsel.

[23] We recognize that the due process analysis of the right to appointed counsel is not identical to that of the right to retain counsel with one's own funds. But Congress clearly

The nature of black lung proceedings supports that conclusion. The determination of black lung benefits turns largely on medical matters. To be eligible for benefits, a miner must establish that he is (a) totally disabled; (b) by pneumoconiosis; (c) arising from coal mine employment. See 30 U.S.C. 922(a), 932(c); *Sebben*, 109 S. Ct. at 420. Given that medical focus, "it is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment." *Walters*, 473 U.S. at 330. See also *Mathews*, 424 U.S. at 344; *Richardson* v. *Perales*, 402 U.S. 389, 404 (1971). Apart from medical matters, the primary issue is to verify the facts regarding a miner's employment. Again, counsel is not essential for that purpose.[24]

Certainly, some black lung cases may be legally or factually more complex, or contentious, than others. Justice Powell emphasized for the Court in *Mathews*, however, that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344. See *Walters*, 473 U.S. at 330 ("a process must be judged

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may restrict an entitlement claimant's funds in order to ensure that the benefits are applied to a claimant's personal needs rather than defraying legal expenses, see pp. 21-25, *supra*.

[24] For example, in *Esselstein* v. *Director, OWCP*, 676 F.2d 228 (6th Cir. 1982) (per curiam), the court of appeals noted that a claimant's counsel had a "straightforward" task to perform because medical evidence had already been submitted by the claimant himself and because "the only thing necessary to qualify the claimant for benefits was submission of proof of coal mine employment." *Id.* at 229. There is no reason to believe that counsel is indispensable in such a situation.

by the generality of cases to which it applies, and therefore a process which is sufficient for the large majority of a group of claims is by constitutional definition sufficient for all of them"); *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979). While case-by-case determinations of the requirements of due process may be appropriate when significant liberty interests are at stake, see, *e.g.*, *Lassiter*, 452 U.S. at 31-32, such an individualized approach is not required here, given the nature of the property interest and the government's countervailing interest in generally-applicable rules to govern a massive benefits program. In any event, the court below clearly erred in concluding that the regulations violate due process in every black lung proceeding, and there is nothing in the record from which to determine whether the regulations have a more serious or detrimental impact on a particular type or group of black lung cases.

In its initial opinion, the court relied exclusively on the experiences of the handful of claimants represented by respondent to support a generalization about the necessity of employing counsel. The court found it significant that respondent was able to obtain benefits for his clients that were previously denied when the clients were without counsel. Pet. App. 22a. The court did not consider, however, that the awards in question may have simply resulted from amendments to the statute under the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, which required reconsideration of the previous denials under standards more favorable to claimants.[25] See *Sebben*, 109 S. Ct. at 418 (dis-

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[25] See R. 4, pt. 1 (awards to claimants in State Bar materials); R. 27 (Department of Labor materials) (showing

cussing 1977 Act). Even granting that the improved results in those few cases were attributable to respondent, there is no basis for speculating that the experience of those claimants was representative of black lung claimants generally.

Nor do the Department of Labor's statistics show that lawyers necessarily produce a better outcome for claimants. Cf. Pet. App. 40a (characterizing the statistics as "conclusively demonstrat[ing] that at the [ALJ] level, claimants represented by counsel have a likelihood of prevailing that is 2.5 times greater than claimants appearing *pro se*"). In the Department's submission, 92% of the claimants were represented in cases resulting in an award or denial of benefits; only a small percentage proceeded pro se. That fact significantly undercuts the use of comparative success rates as a ground for concluding that pro se claimants win less frequently because they lack lawyers. A more likely explanation of the results is that the pro se claimants did not attract lawyers because their cases were weaker. Compare *Lassiter*, 452 U.S. at 29 n.5 (finding similar statistics "unilluminating").

3. *A Claimant's Interest In Black Lung Disability Benefits Is Not Equivalent To That Of A Recipient Of Subsistence Welfare Benefits*

The third *Mathews* factor is the private interest affected. In both *Walters* and *Mathews*, this Court stressed that the disability benefits at issue were not based on need, nor did they constitute a recipient's sole means of livelihood. See *Walters*, 473 U.S. at 333; *Mathews*, 424 U.S. at 342-343. Consequently, the Court declined to equate the significance of those

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that all awards to respondent's clients were made under the 1977 amendments).

benefits to the subsistence welfare benefits considered in *Goldberg* v. *Kelly*. The Court explained in *Mathews* that the unusually heavy weight given the private interest in *Goldberg* came from the unique nature of welfare as "assistance * * * given to persons on the very margin of subsistence." 424 U.S. at 340. " 'The crucial factor in this context—a factor not present in the case of . . . virtually anyone else whose government entitlements are ended—is that the termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits.' " *Ibid.* (quoting *Goldberg*, 397 U.S. at 264).

Here, as in *Mathews* (424 U.S. at 342), the disability benefits sought are but one form of government aid that claimants may seek. Over 90% of black lung beneficiaries' households receive social security benefits and 31% also receive union pensions. *Sample Survey*, *supra*, at 18. What is more, black lung benefits are awarded to former miners who are unable to do coal mining jobs or comparable work. See 30 U.S.C. 902(f)(1)(A). That is a less stringent test of disability than in *Mathews*, where the benefits were available only for inability to do any substantial gainful work in the national economy (424 U.S. at 336). See also 30 U.S.C. 901 (survivors of miners, who do not have to prove any personal disability, are also eligible for benefits).

Respondent argues (Br. in Opp. 7) that black lung claimants more closely resemble the welfare recipients in *Goldberg* because of their modest resources. But the claimants in *Mathews* also had modest resources. Compare 424 U.S. at 342 n.26, with *Sample Survey*, *supra*, at 17. Respondent's observation (Br. in Opp. 7-8) that the black lung benefits (like

social security disability benefits in *Mathews*, see 42 U.S.C. 424a) may be reduced by other sources of income is an argument against their importance to a claimant, not in favor of it.

4. *The Balance Of The* Mathews *Factors Requires The Conclusion That The Fee System Is Constitutional*

Considering the three *Mathews* factors, the balance decidedly tips in favor of the black lung fee system's constitutionality. The government interest in preserving a benefit award for a claimant through fee regulation is important, while changing the attorney's fee system, as contemplated by the court below, would be administratively difficult as well as costly. The current procedures contain adequate safeguards to protect against the erroneous denial of benefits for pro se claimants, and, at all events, an attorney is not an essential element of due process in all black lung cases. Finally, the claimant's interest in the receipt of non-subsistence disability benefits is not so strong as to require the invalidation of the fee system as a means to encourage new attorneys to take these cases. Balancing those factors, the black lung fee system does not violate the due process rights of claimants.

C. The Fee System Does Not Violate Procedural Due Process In Any Other Respect

The court also stated that "[a]lternatively, there is an independent basis for finding a violation of due process." Pet. App. 24a. Citing only *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 49 (1803), the court concluded that the "fee limitation scheme * * * effectively denies claimants the right to benefits granted by Congress," which it believed to be "fundamentally

unfair." Pet. App. 24a. That conclusory analysis is flawed. To the extent that benefits conferred by Congress are protected by the Fifth Amendment, the measure of the process that is due is defined by consideration of the *Mathews* factors. If the procedures are adequate under that test, then the due process inquiry is at an end.

Respondent also attempts to inject into the due process calculus a liberty interest "of an individual to consult with attorneys on matters affecting his legal rights." Br. in Opp. 6. That interest furnishes no additional support for the contention that the fee system is invalid.[26] A "liberty" interest in hiring counsel to seek government benefits is inextricably intertwined with the claimant's interest in effectively presenting a claim for those benefits. Such a liberty interest thus has no more "independent significance" than the asserted First Amendment interest in *Walters*, 473 U.S. at 335. There, the Court rejected the theory that a VA claimant had a First Amendment right to use his resources to obtain "meaningful access to the courts," reasoning that the asserted right was "inseparable" from the due process argument that the VA fee system denies claimants a meaningful opportunity to present a claim. *Ibid.* Here, too, any liberty interest in hiring counsel to prosecute a black lung benefits claim stands or falls with the underlying due process "property" claim. Consequently, the asserted liberty interest does not enhance respondent's due process argument.

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[26] The Court has long since rejected any view that an attorney's "liberty" interest in contracting with a client is immune from government regulation. See *Hines* v. *Lowrey*, 305 U.S. 85 (1938); *Margolin* v. *United States*, 269 U.S. 93, 102 (1925); *Calhoun* v. *Massie*, 253 U.S. 170, 174-175 (1920).

CONCLUSION

The judgment of the West Virginia Supreme Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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